
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
VIRGIL P. SAVULESCU)	
(Chapter 7 Case <u>93-41631</u>))	Number <u>93-4173</u>
)	
<i>Debtor</i>)	
)	
)	
)	
ELECTRA TRADING, S. A.)	
)	
<i>Plaintiff</i>)	
)	
)	
)	
v.)	
)	
VIRGIL P. SAVULESCU)	
)	
<i>Defendant</i>)	

ORDER ON MOTION FOR
SUMMARY JUDGMENT

This proceeding comes before the Court on Plaintiff's Motion for Summary Judgment. Because the Court finds that genuine issues of material fact remain, the Motion

will be denied.

_____ Debtor, and Defendant herein, Virgil P. Savulescu, filed a petition for relief under Chapter 7 of the Bankruptcy Code on September 21, 1993. On December 9, 1993, Plaintiff, Electra Trading, S.A., initiated the instant adversary proceeding seeking a determination that a \$2,111,025.18 default judgment, which it obtained against Debtor in the United States District Court for the Northern District of Illinois, is a nondischargeable debt in Debtor's Chapter 7 case. Plaintiff's Complaint is in two counts; the first seeking a determination of nondischargeability under section 523(a)(4) of the Bankruptcy Code, and the second seeking a determination of nondischargeability under section 523(a)(2)(A).

Plaintiff moves the Court for summary judgment only as to Count 1 of its Complaint, setting forth two bases for its Motion. First, Plaintiff asserts that the pleadings, depositions, affidavits and exhibits introduced in this proceeding establish the nondischargeability of the judgment as a matter of law under section 523(a)(4). Alternatively, Plaintiff contends that Debtor is collaterally estopped from relitigating certain findings of the Illinois District Court in the default judgment, and that these findings establish the nondischargeability of the judgment under section 523(a)(4).

Taking Plaintiff's arguments in reverse order, "collateral estoppel precludes the relitigation of an issue that has been previously decided in a judicial proceeding if the party against whom the prior decision is asserted had a 'full and fair opportunity to litigate that issue in an earlier proceeding.'" Matter of Lutz, 169 B.R. 473, 476-77 (Bankr. S.D.Ga. 1994) (Davis, B.J.) (*quoting* In re St. Laurent, 991 F.2d 672, 675 (11th Cir. 1993)). The party seeking to invoke collateral estoppel to preclude litigation of an issue bears the burden of proving the existence of the following four elements with respect to that issue:

- 1) The issue at stake is identical to the one involved in the prior litigation;
- 2) The issue was actually litigated in the prior judicial proceeding;
- 3) The determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and
- 4) The party against whom the other decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.

Matter of Lutz, 169 B.R. 473, 476-77 (Bankr. S.D.Ga. 1994) (Davis, B.J.) (*citing* Matter of McWhorter, 887 F.2d 1564, 1566 (11th Cir. 1989))¹ "A default judgment is normally not given preclusive effect under the collateral estoppel doctrine because no issue has been

¹See also I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986); Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985); DeWeese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982).

'actually litigated.'" Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th Cir. 1994).²

It is undisputed that the Illinois District Court entered default judgment against the Debtor after he failed to answer or otherwise defend Plaintiff's complaint against him in that court. Thus, none of the issues that were resolved in Plaintiff's favor when the District Court entered default judgment were actually litigated as against Debtor. Plaintiff attempts to avoid this result by arguing that, because Debtor's co-defendant in that action, Darlene A. Sears, did appear and litigate the matter, the "actually litigated" requirement is satisfied as to Debtor, as well. This Court is unpersuaded, however, that it is appropriate to impute Sears' litigation of the matter to Debtor. None of the cases cited by Plaintiff suggest otherwise.³ Accordingly, the default judgment entered by Illinois District Court shall not be given preclusive effect in this proceeding.⁴

² See also In re Raynor, 922 F.2d 1146, 1149 (4th Cir. 1991); In re Goetz, 134 B.R. 367, 368 (Bankr. W.D.Mo. 1991).

³ See e.g., In re Herwig, 77 B.R. 662, (Bankr. S.D.Ill. 1987) (issues decided by default judgment were actually litigated where the debtor had answered complaint and filed counterclaim); In re Wein, 155 B.R. 479, 483-84 (Bankr. N.D.Ill. 1993) (issues decided by judgment entered after debtor failed to file statement of material facts in response to summary judgment motion were actually litigated)

⁴ The Court recognizes the imperfection in this result. It permits a debtor who sits back and allows a default judgment to be entered against him to come before the bankruptcy court and get a second chance at litigating the issues that he should have litigated in the initial action. This result obtains because the doctrine of res judicata, which precludes parties and their privies from relitigating issues that have been, or could have been, decided by a final judgment on the merits, is inapplicable to dischargeability actions in bankruptcy. See Brown v. Felsen, 442 U.S. 127, 134-38, 99 S.Ct. 2205, 2211-13, 60 L.Ed.2d 767 (1979); In re Wein, 155 B.R. 479, 483-84 (Bankr. N.D.Ill. 1993).

As to the question of whether the record in this proceeding demonstrates that Plaintiff is entitled to judgment as a matter of law, the Court concludes that there are a number of factual issues left unresolved by Plaintiff's Motion. Bankruptcy Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Bank, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . ". United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (*quoting* Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of

material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forth with some evidence to show that a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court should consider "all the evidence in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

In applying this standard to the summary-judgment record in this case, the court is particularly mindful of the fact that Plaintiff bears the burden of proof with respect to all issues in this proceeding. Taking this, and the fact that all evidence must be viewed in the light most favorable to the Debtor, as the non-moving party, into consideration, I find that genuine issues of material fact remain. Without attempting to exhaustively cover these, a non-exclusive list of these material facts includes:

- 1) The intent of the parties with respect to the money deposited into the Romtech account: Was the money deposited into Romtech's bank account with the understanding of all parties that it remained the property of Plaintiff and that Romtech was merely acting in a custodial manner.
- 2) The amount of the debt. Most of the money removed from the Romtech account was ultimately recovered, yet Plaintiff claims a debt of over \$2 million based upon

consequential damages that it allegedly suffered as a result of the removal of the funds. The Court is most reluctant, absent compelling evidence in the record, to find a debt of this sort nondischargeable on summary judgment. Plaintiff's evidence on this point is less than compelling.

- 3) Whether a fiduciary relationship existed between Plaintiff, as a shareholder of Romtech, and the Debtor, an officer and director of Romtech. It is clear that Debtor acted as a fiduciary to Romtech in his capacity as a director and shareholder. It is less clear, however, that Debtor's fiduciary duty extended directly to Plaintiff. Generally, the director or officer of a corporation owes a fiduciary duty only to the corporation, and not its shareholders. A shareholder's right against a director or officer is, therefore, typically derivative of the corporation's right against the director or officer. The record is unclear as to whether Plaintiff can assert for itself the benefit of any fiduciary duty that Debtor owed to Romtech.

Because these and other issues of fact and law remain unresolved, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment of Plaintiff, Electra Trading, S.A., is hereby DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1995.